

Did claimant prove that he suffered accidental injury arising out of and in the course of his employment?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury on numerous dates. At the pre-hearing settlement conference, it was alleged that claimant suffered a series of accidents beginning December 1, 2002, through February 24, 2003. The E-1 filed by claimant in this matter also indicated a series of accidents beginning December 1, 2002, and each day worked thereafter. At regular hearing, claimant testified to a specific incident occurring on October 30, 2002, at which time a tree which he had notched began falling the wrong direction while he was cutting it. Claimant testified that he suffered an injury to his left shoulder while he was trimming trees. A tree started to fall wrong, so he tried to redirect it or he pushed the tree, and he heard a popping noise in his shoulder and felt immediate pain.

Claimant had an appointment with his family doctor, Mark A. Thomas, M.D., the next day, on October 31, 2002. While he did discuss left shoulder pain, amongst other varying complaints, claimant failed to provide a history of a left shoulder injury to Dr. Thomas. It was not until January 28, 2004, that claimant related to Dr. Thomas that his left shoulder injury was a work-related injury.

Claimant was referred by Dr. Thomas to board certified orthopedic surgeon Michael J. Schmidt, M.D. He first saw Dr. Schmidt on November 13, 2002. At that time, he provided Dr. Schmidt with a history of six months of left, non-dominant shoulder pain. Claimant failed to identify any specific incident or injury that caused his pain, although he did discuss the above shoulder use of his hand while at work. There was no mention of the tree incident in Dr. Schmidt's report.

Claimant was referred by his attorney to Dick Geis, M.D., board certified in internal medicine, emergency medicine and occupational medicine. Dr. Geis examined claimant on March 10, 2004. His report reflected that claimant suffered an injury on December 1, 2002, while cutting tree limbs. There is no indication in Dr. Geis's records of an October 2002 accident.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> The ALJ, in reviewing the "vastly different histories of injury,"<sup>2</sup> came to the conclusion that claimant was

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

<sup>2</sup> Award at 3.

incredible and that he had failed in his burden of proof to establish personal injury by accident arising out of and in the course of his employment.

The numerous remaining issues were not decided by the ALJ, as the determination regarding whether claimant suffered accidental injury arising out and in the course of employment rendered the remaining issues moot. The Board, in reviewing the evidence, finds claimant's differing and confusing history of injury casts serious doubt on his claim. The Board affirms the ALJ's determination that claimant's testimony is incredible and that he has failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent. The Board, therefore, affirms the denial of benefits by the ALJ.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated February 14, 2005, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Zachary A. Kolich, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director